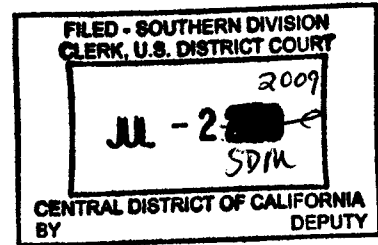


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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PERFORMANCE CREDIT
CORPORATION, f/k/a "ENCORE CREDIT
CORP.", a California corporation; and ECC
CAPITAL CORPORATION, a Maryland
corporation,

Plaintiffs,

vs.

EMC MORTGAGE CORPORATION, a
Delaware corporation; BEAR STEARNS
RESIDENTIAL MORTGAGE
CORPORATION, a Delaware corporation,

Defendants.

Case No. SACV07-383 DOC (RNBx)

**REPORT AND RECOMMENDATION
OF DISCOVERY REFEREE**

(June 6, 2009)

The undersigned having been appointed Discovery Referee/Special Master (Referee) in the above entitled matter to consider and offer recommendations to the Court regarding discovery disputes conducted a telephonic hearing on June 4, 2009, to address discovery issues. Appearing on behalf of Plaintiffs Performance Credit Corporation (Performance) and ECC Capital Corporation (ECC) were Theodore J. Cohen, Esq., and Brian E. Shear, Esq., of the firm

1 Spolin, Silverman & Cohen, and Paul B. George, Esq., of the firm Foster Pepper LLP.
2 Appearing on behalf of Defendants Bear Stearns Residential Mortgage Corporation (Bear) and
3 EMC Mortgage Corporation (EMC) were Marlene C. Nowlin, Esq., and Peter H. Bales, Esq., of
4 the firm Severson & Werson.

5 The following issues were addressed and will be the subject of the Report and
6 Recommendation that follows:

7 1. Motion of Defendant Bear to compel further responses by Plaintiff ECC to Bear
8 Special Interrogatories, Set 2;

9 2. Motion of Defendant Bear to compel further responses by Plaintiff Performance to
10 Bear Special Interrogatories, Set 2;

11 3. Motion of Defendant EMC to compel further responses by Plaintiff ECC to EMC
12 Special Interrogatories, Set 2;

13 4. Motion of Defendant EMC to compel further responses by Plaintiff Performance to
14 EMC Special Interrogatories, Set 2;

15 5. Motion of Defendants Bear and EMC to compel further responses by Plaintiff ECC to
16 Bear and EMC Joint Requests for Production of Documents, Set 2; and,

17 6. Motion of Defendants Bear and EMC to compel further responses by Plaintiff
18 Performance to Bear and EMC Joint Requests for Production of Documents, Set 2.

19 Additional issues were discussed and (hopefully) resolved during the hearing and they
20 will not be addressed in this Report and Recommendation. Having considered the submissions
21 of the parties the Referee submits the following Report and Recommendation.

22 23 **REPORT**

24 The discovery which is the subject of this Report and Recommendation addresses the
25 contentions made by Plaintiffs Performance and ECC in the Second Amended Complaint.
26 Although six motions are addressed herein, for purposes of this discussion they can be divided
27 into three subsets: 1) Special Interrogatories propounded by Defendant Bear to Plaintiffs ECC
28 and Performance; 2) Special Interrogatories propounded by Defendant EMC to Plaintiffs ECC

1 and Performance; and, 3) Requests for Production of Documents propounded by Defendants
2 Bear and EMC jointly to Plaintiffs ECC and Performance.

3 This discovery addresses one or more of the following contentions made by Plaintiffs
4 herein:

5 a. Defendants Bear and EMC failed to protect Plaintiffs from early payment defaults by
6 borrowers in breach of the agreements between the parties;

7 b. Defendants Bear and EMC failed to discharge their servicing obligations in
8 accordance with the servicing standards defined in the Servicing Agreement executed by the
9 parties;

10 c. the consideration received by Plaintiffs for loans sold to Defendants was negatively
11 impacted by the decline in value of those loans as a result of Defendants' breach of the
12 Servicing Agreement;

13 d. Defendants breached the Servicing Agreement by failing to act diligently to collect all
14 payments due under the loans sold by Plaintiffs to Defendants;

15 e. Defendants breached the Asset Purchase Agreement between the parties by failing to
16 securitize the loans purchased by Defendants from Plaintiffs on a monthly basis.

17 The interrogatories addressing each of these contentions typically request some or all of
18 the following: facts supporting the contention; identity of witnesses with knowledge of those
19 facts; identification of documents supporting the contention; the amount of damages being
20 claimed as result of each breach; how the damages claimed were calculated; the amounts
21 actually received by Plaintiffs through the sale of loans to Defendants; and, all other damages.

22 A brief description of the underlying business relationship between the parties may be
23 helpful. Plaintiffs were in the business of making (originating) mortgage secured loans.
24 Approximately 13,000 of these loans are the subject of this action. As the loans were made
25 Plaintiffs would transfer or sell them to Defendants. Defendants would then accumulate or
26 warehouse the loans purchased from Plaintiffs until Defendants could package a number of
27 them in a process known as "securitization," and then sell the securitized loans in the investment
28 market. The price received upon sale of the securitized loans, less specified amounts that were

1 to be retained by Defendants in compensation for their services, determined the amount
2 ultimately received by Plaintiffs. Plaintiffs would sell the loans to Defendants, Defendants
3 would accumulate and securitize the loans, then Defendants would sell the securitized loans in
4 the investment market whereupon the price to be paid by Defendants to Plaintiffs would be
5 determined and paid.

6 While this process was running its course the loans, from the date of their origination by
7 Plaintiffs to the date of their sale in the market as part of a securitized investment vehicle,
8 required servicing. Servicing the loans involved communications with borrowers as to where
9 and when payments were to be made, monitoring to insure payments were being made,
10 collection activities in the event of default in the making of payments, and other activities
11 normally associated with the management of loans. Of particular concern to the parties herein
12 was any default by the borrower in making payments, a situation that was referred to as "early
13 payment default" (EPD). EPD was critical because the payment history had to be disclosed and
14 if a loan was in default it would, naturally, negatively impact the value of that loan and the
15 securitized package that it was a part of. EPDs would thereby depress the value of the security
16 in the investment market and reduce the payment received by Plaintiffs.

17 Servicing, rather than an unwanted obligation, is apparently viewed in the loan industry
18 as a profit making opportunity since fees are typically charged for this activity. In regard to
19 servicing, the loans involved in this action can be divided into several categories. Plaintiffs
20 contend that prior to October 1, 2006, all loans were being serviced by Plaintiffs until they were
21 securitized and sold in the investment market. As to these loans there are no servicing issues
22 because Plaintiffs continued to service the loans until they were sold and the amount to which
23 Plaintiffs were entitled had been determined.

24 During the month of October, 2006, Plaintiffs contend the loans that had been sold to
25 Defendants were being serviced by Defendants pending the securitization of those loans and
26 their sale in the investment market. As to these loans Plaintiffs contend their value was reduced
27 as a result of Defendants' breach of their obligations in regard to servicing.

1 Plaintiffs also allege that beginning November 1, 2006, Defendants assumed the
 2 servicing function in regard to loans that had not yet been purchased by Defendants. In dispute
 3 is the issue of whether Defendants' assumption of the servicing function as to this last category
 4 of loans was pursuant to an enforceable agreement between the parties.

5 Damages sought by Plaintiffs are primarily based on the reduction in market value of the
 6 securitized loans which Plaintiffs contend was caused by Defendants' breach of the various
 7 agreements between the parties.

8 In summary, Plaintiffs contend that Defendants are in breach of various contractual
 9 obligations in regard to the timing of Defendants' purchase of the loans in question and the
 10 manner in which Defendants serviced and securitized the loans. It is in this context the
 11 discovery issues addressed herein will be discussed.

12 On or about May 15, 2009, after the filing of Defendants' motions herein, Plaintiffs
 13 provided supplemental responses to some of the interrogatories and/or requests for production
 14 addressed herein. These supplemental responses have been considered by the Referee.

15
 16 **1. Special Interrogatories propounded by Defendant Bear to Plaintiffs ECC and**
 17 **Performance.**

18 This motion requests additional responses be required as to Special Interrogatory Nos.
 19 15, 16, 17, 18, 19, 20, 21, and 22 propounded by Defendant Bear to Plaintiffs. The
 20 interrogatories propounded to each plaintiff are identical and will be discussed collectively.

21 As to Interrogatory No. 15

22 This interrogatory seeks the loan number and closing date of each loan EMC failed to
 23 purchase on a monthly basis. The Referee finds Plaintiffs' responses and supplemental
 24 responses are sufficient and no additional responses should be required.

25 As to Interrogatory No. 16

26 This interrogatory seeks the loan number and closing date of each loan as to which EMC
 27 is alleged to have breached the agreements between the parties by failing to protect Plaintiffs
 28 from early payment default in breach of the agreements between the parties. The responses

1 expand upon the nature of Plaintiffs' allegations as to the conduct engaged in by EMC, but fail
2 to identify the loans involved.

3 Subsection (a) of the interrogatory seeks facts supporting Plaintiffs' contentions in
4 regard to the alleged breaches by EMC. Plaintiffs' responses include the assertion that the facts
5 are the subject of ongoing expert investigation and analysis and therefore need not be disclosed.
6 This circumstance is not an excuse for failing to disclose facts that are known to the responding
7 party and are responsive to the interrogatory. Additional responses should be required.

8 Subsection (b) requests Plaintiffs identify witnesses supporting their contentions. The
9 Interrogatories define the term "identify" as including "name address and telephone number."
10 The responses do not provide this information or give any other information as to how each
11 witness may be contacted. From prior hearings in this matter the Referee understands that as
12 too many if not all of the witnesses identified the parties are well aware of their location and
13 already are in possession of the contact information requested. The Referee will make no
14 recommendation in regard to this response at this time.

15 Subsection (f) seeks the amount of money received by Plaintiffs in payment for the loans
16 sold to EMC. Although the Plaintiffs' responses address the gross amounts received from
17 Defendants they do not identify the subset of loans described in this interrogatory. The
18 responses are silent in this regard and additional responses should be required.

19 As to Interrogatory No. 17

20 Interrogatory No. 17 requests the loan number and closing date of each loan as to which
21 EMC failed to discharge its servicing obligations in accordance with the "servicing standards
22 defined in the Servicing Agreement." Plaintiffs have made no effort to identify any of the
23 specific loans that were the subject of the Servicing Agreement, nor did the responses indicate
24 EMC breached its duties in regard to all of the loans. Further responses should be required.

25 Subsection (a) requests that each the "servicing standards" referred to by Plaintiffs in
26 their Second Amended Complaint be identified. No specific provisions of the Servicing
27 Agreement were identified in Plaintiffs' responses to this interrogatory. Additional responses
28 should be required.

1 Subsection (b) requests the facts supporting Plaintiffs' allegations in this regard.
 2 Plaintiffs' responses consist of conclusions not supported by factual assertions. Additional
 3 responses should be required.

4 No response was provided as to subsections (c), (d), (e), (f), (g) and (h). Additional
 5 responses should be required.

6 Interrogatory No. 18

7 Interrogatory No. 18 seeks the loan number and closing date of each loan that
 8 substantially declined in value as a result of EMC's alleged breaches of the agreements between
 9 the parties. While Plaintiffs' responses expand upon their argument that there were such
 10 breaches and a resultant decline in value of the loans, they do not provide any loan numbers or
 11 closing dates for those loans. The references to responses to other interrogatories are generic in
 12 nature and do not specify what portion of the other responses is being incorporated into this
 13 response. Additional responses should be required.

14 Subsection (a) requests Plaintiffs to specify the provisions of the Servicing agreement
 15 that Bear is alleged to have breached. No effort was made by Plaintiffs to identify any of the
 16 provisions of the Servicing Agreement that were breached by Bear. Additional responses
 17 should be required.

18 As to Subsections (b), (c), (d), (e), (f) and (g), there are no identifiable responses other
 19 than a reference to the response to Interrogatory No. 16, and that response, as indicated above,
 20 has been found to be insufficient. Additional responses should be required.

21 Interrogatory No. 19

22 Interrogatory No. 19 seeks the loan number and closing date of each loan in regard to
 23 which EMC is alleged to have breached the Servicing Agreement by failing to act diligently to
 24 collect all payments that became due. While Plaintiffs' responses expand upon their argument
 25 that there were such breaches and a resultant decline in value of the loans, they do not provide
 26 any loan numbers or closing dates for the specific loans described in the interrogatory. The
 27 references to responses to other interrogatories are generic in nature and do not specify what
 28

1 portions of the other responses are being incorporated into this response. Additional responses
2 should be required.

3 As to Subsections (a), (b), (c), (d), (e), (f) and (g), there are no identifiable responses
4 other than a reference to the response to Interrogatory No. 16, and that response, as indicated
5 above, has been found to be insufficient. Additional responses should be required.

6 Interrogatory No. 20

7 This interrogatory, as modified by agreement between the parties, seeks information
8 regarding all persons or entities who submitted borrower applications for loans funded by
9 Plaintiffs between October 1, 2006, and March 30, 2008. Portions of the original interrogatory
10 that made it unintelligible have been deleted.

11 The interrogatory, as amended, seeks information that has discovery relevance. The
12 Referee will recommend further responses be required.

13 Interrogatory No. 21

14 This interrogatory seeks the loan number and closing date of each loan as to which EMC
15 is alleged to have breached the agreement between the parties by failing to securitize these loans
16 on a monthly basis. While Plaintiffs' responses expand upon their argument that there were
17 such breaches and a resultant decline in value of the loans, they do not provide any loan
18 numbers or closing dates for those loans. The references to responses to other interrogatories
19 are generic in nature and do not specify what portions of the other responses are being
20 incorporated into this response. Additional responses should be required.

21 As to subsections (a), (b) and (c), the responses provided by Plaintiffs are not responsive
22 to the questions. As to subsections (d), (e), (f), (g), and (h), the references to "Supplemental
23 Schedule A" do not specify which of the loans listed therein are being referenced or if all of the
24 loans listed are being referenced. Additional responses should be required.

25 Interrogatory No. 22

26 This interrogatory seeks the loan number and closing date of each loan as to which EMC
27 is alleged to have breached the agreement between the parties by failing to cause the timely
28 securitization of such loans. Again, while Plaintiffs' responses expand upon their argument

1 that there were such breaches and a resultant decline in value of the loans, they do not provide
 2 any loan numbers or closing dates for those loans. The references to responses to other
 3 interrogatories are generic in nature and do not specify what portions of those other responses
 4 are being incorporated into this response. Additional responses should be required.

5 As to subsections (a), (b) and (c), the responses provided by Plaintiffs are not responsive
 6 to the questions. As to subsections (d), (e), (f), (g), (h) and (i), the references to "Supplemental
 7 Schedule A" do not specify which of the loans listed therein are being referenced or if all of the
 8 loans listed are being referenced. Additional responses should be required.

9
 10 **2. Special Interrogatories propounded by Defendant EMC to Plaintiffs ECC and**
 11 **Performance.**

12 This motion requests additional responses be required as to Special Interrogatory Nos.
 13 18, 20, 21, 22, 23, 24 and 25 propounded by Defendant EMC to Plaintiffs. The interrogatories
 14 propounded to each plaintiff are identical and will be discussed collectively. It should also be
 15 noted that the two sets of interrogatories propounded by Defendant EMC to Plaintiffs are
 16 substantially identical to the two sets propounded by Defendant Bear to Plaintiffs discussed in
 17 "1." above, however the numbers used in the Bear Interrogatories do not correspond with the
 18 numbers used in the EMC Interrogatories. The Referee has elected to deal with this situation by
 19 essentially repeating the discussion offered in regard to the Bear Interrogatories here in regard to
 20 the EMC Interrogatories with appropriate changes in the numbers identifying each
 21 interrogatory. (The Referee accepts the fact that sometimes the explanation is more difficult to
 22 understand than the problem being explained.)

23 Interrogatory No. 18

24 This interrogatory seeks the loan number and closing date of each loan EMC failed to
 25 purchase on monthly basis in breach of the agreements between the parties. The Referee finds
 26 Plaintiffs' responses and supplemental responses are sufficient and no additional responses
 27 should be required.

28 Interrogatory No. 19

1 This interrogatory seeks the loan number and closing date of each loan as to which EMC
 2 is alleged to have breached the agreements between the parties by failing to protect Plaintiffs
 3 from early payment default. The responses expand upon the nature of Plaintiffs' allegations as
 4 to the conduct engaged in by EMC, but fail to identify the loans involved.

5 Subsection (a) of the interrogatory seeks facts supporting Plaintiffs' contentions in
 6 regard to the alleged breaches by EMC. Plaintiffs' responses include the assertion that the facts
 7 are the subject of ongoing expert investigation and analysis and therefore need not be disclosed.
 8 This circumstance is not an excuse for failing to disclose facts that are known to the responding
 9 party and are responsive to the interrogatory. Additional responses should be required.

10 Subsection (b) requests Plaintiffs identify witnesses supporting their contentions. The
 11 Interrogatories define the term "identify" as including "name address and telephone number."
 12 The responses do not provide this information or give any other information as to how each
 13 witness may be contacted. From prior hearings in this matter the Referee understands that as
 14 too many if not all of the witnesses identified the parties are well aware of their location and
 15 already are in possession of the contact information requested. The Referee will make no
 16 recommendation in regard to this response at this time.

17 Subsection (f) seeks the amount of money received by Plaintiffs in payment for the loans
 18 sold to EMC. Although the Plaintiffs' responses address the gross amounts received from
 19 Defendants they do not identify the subset of loans described in this interrogatory. The
 20 responses are silent in this regard and additional responses should be required.

21 Interrogatory No. 20

22 Interrogatory No. 20 requests the loan number and closing date of each loan as to which
 23 EMC failed to discharge its servicing obligations in accordance with the "servicing standards
 24 defined in the Servicing Agreement." Plaintiffs have made no effort to identify the specific
 25 loans that were the subject of the Servicing Agreement, nor did the responses indicate EMC
 26 breached its duties in regard to all of the loans. Further responses should be required.

27 Subsection (a) requests that each the "servicing standards" referred to by Plaintiffs in
 28 their Second Amended Complaint be identified. No specific provisions of the Servicing

1 Agreement were identified in Plaintiffs' responses to this interrogatory. Additional responses
2 should be required.

3 Subsection (b) requests the facts supporting Plaintiffs' allegations in this regard.
4 Plaintiffs' responses consist of conclusions not supported by factual assertions. Additional
5 responses should be required.

6 No response was provided as to subsections (c), (d), (e), (f), (g) and (h). Additional
7 responses should be required.

8 Interrogatory No. 21

9 Interrogatory No. 21 seeks the loan number and closing date of each loan that
10 substantially declined in value as a result of EMC's alleged breaches of the agreements between
11 the parties. While Plaintiffs' responses expand upon their argument that there were such
12 breaches and a resultant decline in value of the loans, they do not provide any loan numbers or
13 closing dates for those loans. The references to responses to other interrogatories are generic in
14 nature and do not specify what portion of the other responses is being incorporated into this
15 response. Additional responses should be required.

16 Subsection (a) requests Plaintiffs to specify the provisions of the Servicing agreement
17 that EMC is alleged to have breached. No effort was made by Plaintiffs to identify any of the
18 provisions of the Servicing Agreement that were breached by EMC. Additional responses
19 should be required.

20 As to Subsections (b), (c), (d), (e), (f) and (g), there are no identifiable responses other
21 than a reference to the response to Interrogatory No. 16, and that response, as indicated above,
22 has been found to be insufficient. Additional responses should be required.

23 Interrogatory No. 22

24 Interrogatory No. 19 seeks the loan number and closing date of each loan in regard to
25 which EMC is alleged to have breached the Servicing Agreement by failing to act diligently to
26 collect all payments that became due. While Plaintiffs' responses expand upon their argument
27 that there were such breaches and a resultant decline in value of the loans, they do not provide
28 any loan numbers or closing dates for the specific loans described in the interrogatory. The

1 references to responses to other interrogatories are generic in nature and do not specify what
 2 portions of the other responses are being incorporated into this response. Additional responses
 3 should be required.

4 As to Subsections (a), (b), (c), (d), (e), (f) and (g), there are no identifiable responses
 5 other than a reference to the response to Interrogatory No. 16, and that response, as indicated
 6 above, has been found to be insufficient. Additional responses should be required.

7 Interrogatory No. 23

8 This interrogatory, as modified by agreement between the parties, seeks information
 9 regarding all persons or entities who submitted borrower applications for loans funded by
 10 Plaintiffs between October 1, 2006, and March 30, 2008. Portions of the original interrogatory
 11 that made it unintelligible have been deleted.

12 The interrogatory, as amended, seeks information that has discovery relevance. The
 13 Referee will recommend further responses be required.

14 Interrogatory No. 24

15 This interrogatory seeks the loan number and closing date of each loan as to which EMC
 16 is alleged to have breached the agreement between the parties by failing to securitize these loans
 17 on a monthly basis. While Plaintiffs' responses expand upon their argument that there were
 18 such breaches and a resultant decline in value of the loans, they do not provide any loan
 19 numbers or closing dates for those loans. The references to responses to other interrogatories
 20 are generic in nature and do not specify what portions of the other responses are being
 21 incorporated into this response. Additional responses should be required.

22 As to subsections (a), (b) and (c), the responses provided by Plaintiffs are not responsive
 23 to the questions. As to subsections (d), (e), (f), (g), and (h), the references to "Supplemental
 24 Schedule A" do not specify which of the loans listed therein are being referenced or if all of the
 25 loans listed are being referenced. Additional responses should be required.

26 Interrogatory No. 25

27 This interrogatory seeks the loan number and closing date of each loan as to which EMC
 28 is alleged to have breached the agreement between the parties by failing to cause the timely

1 securitization of such loans. Again, while Plaintiffs' responses expand upon their argument
 2 that there were such breaches and a resultant decline in value of the loans, they do not provide
 3 any loan numbers or closing dates for those loans. The references to responses to other
 4 interrogatories are generic in nature and do not specify what portions of the other responses are
 5 being incorporated into this response. Additional responses should be required.

6
 7 **3. Requests for Production of Documents propounded by Defendants Bear and EMC**
 8 **jointly to Plaintiffs ECC and Performance.**

9 This motion requests additional responses be required as to Request for Production Nos.
 10 54, 57, 60, 63, 70, 73, 76, 77, 78 and 79. The responses provided by Plaintiffs ECC and
 11 Performance are identical and will be discussed collectively.

12 Request for Production No. 54

13 This request seeks production of "all loan files relating to each loan for which EMC
 14 breached the (Amended Loan Purchase Agreement) by not purchasing loans on a 'monthly
 15 basis' as alleged in the (Second Amended Complaint)."

16 Plaintiffs' responses state that all of the loan files described were delivered to
 17 Defendants on or about February 9, 2007. Plaintiffs further state they retained electronic data
 18 files (Data Files) containing information abstracted from the loan files that were delivered to
 19 Defendants. It is Defendants' contention that Plaintiffs should be required to produce copies of
 20 the Data Files.

21 It should be noted that the delivery of the original files on or about February 9, 2007,
 22 was prior to the commencement of this action and therefore not a part of formal discovery.
 23 Defendants, even assuming they have in their possession the original files identified by
 24 Plaintiffs as having been previously delivered to Defendants, are entitled to this production if for
 25 no other reason than to confirm that nothing was withheld from the files delivered to them.

26 Plaintiffs contend copies of the Data Files have previously been produced in discovery.
 27 Plaintiffs should be required to provide further responses to this request including electronic
 28 copies of the Data Files or specific references to any prior production containing the Data Files.

1 Request for Production Nos. 57

2 This request seeks production of “all loan files relating to each loan for which EMC
3 breached the (Amended Loan Purchase Agreement) by not (sic) failing to ‘protect Performance
4 from early payment defaults by borrows’ as alleged in the (Second Amended Complaint.” The
5 parties have apparently agreed the word “not” was inserted by mistake and have treated this
6 request as though that word has been stricken.

7 Plaintiffs’ responses indicate prior to the commencement of this action they delivered
8 these files to Defendants. Plaintiffs acknowledge they have in their possession electronic data
9 files (Data Files) containing information abstracted from the loan files that were delivered to
10 Defendants. Plaintiffs contend copies of the Data Files have previously been produced in
11 discovery.

12 For the reasons set forth in the discussion of Request for Production No. 54 (above)
13 Plaintiffs should be required to provide further responses that include copies of their Data Files
14 or specific references to any prior discovery production containing the Data Files.

15 Request for Production No. 60

16 This request seeks production of all loan files “relating to each loan for which EMC
17 breached the Asset Purchase Agreement by failing to securitize ‘on a monthly basis’ as alleged
18 in the (Second Amended Complaint).

19 Plaintiffs’ responses indicate prior to the commencement of this action they delivered
20 these files to Defendants. Plaintiffs acknowledge they have in their possession electronic data
21 files (Data Files) containing information abstracted from the loan files that were delivered to
22 Defendants. Plaintiffs contend copies of the Data Files have previously been produced in
23 discovery.

24 For the reasons set forth in the discussion of Request for Production No. 54 (above)
25 Plaintiffs should be required to provide further responses that include copies of their Data Files
26 or specific references to any prior discovery production containing the Data Files.

27 Request for Production No. 63

1 This request seeks production of “all documents supporting your contention that EMC
2 breached the Asset Purchase Agreement by failing ‘to cause the timely securitization’ of loans
3 in breach of the Asset Purchase Agreement as alleged in the (Second Amended Complaint).”

4 While the request is for all documents, the response speaks only to loan files and does
5 not address whether there are other responsive documents in Plaintiffs’ possession not included
6 in the loan files. Plaintiffs acknowledge they have in their possession electronic data files (Data
7 Files) containing information abstracted from the loan files that were delivered to Defendants.
8 Plaintiffs contend copies of the Data Files have previously been produced in discovery.

9 For the reasons set forth in the discussion of Request for Production No. 54 (above)
10 Plaintiffs should be required to provide further responses that include copies of their Data Files
11 or specific references to any prior discovery production containing these files. Plaintiffs’
12 response should also address the inference raised by their last response that responsive
13 documents may exist that were not part of the loan files delivered to Defendants prior to
14 commencement of this action or stored in the Data Files.

15 Request for Production No. 70

16 This request seeks production of “all loan files relating to each loan for which EMC
17 failed to ‘discharge its servicing obligations in accordance with the servicing standards’ defined
18 in the Servicing Agreement as alleged in the Second Amended Complaint.”

19 Plaintiffs’ responses indicate prior to the commencement of this action they delivered
20 these loan files to Defendants. Plaintiffs acknowledge they have in their possession electronic
21 data files (Data Files) containing information abstracted from the loan files that were delivered
22 to Defendants. Plaintiffs contend copies of the Data Files have previously been produced in
23 discovery.

24 For the reasons set forth in the discussion of Request for Production No. 54 (above)
25 Plaintiffs should be required to provide further responses that include copies of their Data Files
26 or specific references to any prior discovery production containing the Data Files.

27 Request for Production No. 73

1 This request seeks “all loan files for each loan that ‘declined’ in value ‘substantially’ as a
2 result of EMC’s servicing breaches as alleged in the (Second Amended Complaint).

3 Plaintiffs’ responses indicate prior to the commencement of this action they delivered
4 these files to Defendants. Plaintiffs acknowledge they have in their possession electronic data
5 files (Data Files) containing information abstracted from the loan files that were delivered to
6 Defendants. Plaintiffs contend copies of the Data Files have previously been produced in
7 discovery.

8 For the reasons set forth in the discussion of Request for Production No. 54 (above)
9 Plaintiffs should be required to provide further responses that include copies of their Data Files
10 or specific references to any prior discovery production containing the Data Files.

11 Request for Production No. 76

12 This request seeks “all correspondence with all persons or entities, including mortgage
13 brokers and account executives, who submitted borrower applications for loans (Plaintiffs)
14 funded between October 1, 2006 and March 30, 2008.”

15 Plaintiffs’ responses indicate prior to the commencement of this action they delivered all
16 loan files to Defendants. Plaintiffs acknowledge they have in their possession electronic data
17 files (Data Files) containing information abstracted from the loan files that were delivered to
18 Defendants, and the information requested herein is contained in the Data Files as to those
19 loans. Plaintiffs contend copies of the Data Files have previously been produced in discovery.

20 For the reasons set forth in the discussion of Request for Production No. 54 (above)
21 Plaintiffs should be required to provide further responses that include copies of their Data Files
22 or specific references to any prior discovery production containing the Data Files.

23 Plaintiffs’ responses indicate prior to the commencement of this action they delivered all
24 loan files to Defendants. Plaintiffs acknowledge they have in their possession electronic data
25 files (Data Files) containing information abstracted from the loan files that were delivered to
26 Defendants, and the information requested herein may be contained in the Data Files. Plaintiffs
27 contend copies of the Data Files have previously been produced in discovery.

1 Plaintiffs should be required to provide further responses that include copies of their
2 Data Files or specific references to any prior discovery production containing the Data Files.

3 Request for Production No. 77

4 This request seeks "all documents relating or referring to all persons or entities,
5 including mortgage brokers and account executives, who submitted borrower applications for
6 loans (Plaintiffs) funded between October 1, 2006 and March 30, 2008."

7 Plaintiffs' responses indicate prior to the commencement of this action they
8 delivered all loan files to Defendants. Plaintiffs acknowledge they have in their possession
9 electronic data files (Data Files) containing information abstracted from the loan files that were
10 delivered to Defendants, and the information requested herein is contained in the Data Files as
11 to those loans. Plaintiffs contend copies of the Data Files have previously been produced in
12 discovery.

13 Plaintiffs should be required to provide further responses that include copies of their
14 Data Files or specific references to any prior discovery production containing these files.

15 Request for Production No. 78

16 This request seeks all documents relating or referring to Friedman, Billings, Ramsey and
17 Co., Inc.

18 By agreement between the parties this request was modified to address the time period
19 January 1, 2005 through February 9, 2007. The Referee will recommend further responses be
20 required as to documents generated during this time period.

21 Request for Production No. 79

22 This request seeks all documents relating or referring to John Hamel of Friedman,
23 Billings, Ramsey and Co., Inc.

24 By agreement between the parties this request was modified to address the time period
25 January 1, 2005 through February 9, 2007. The Referee will recommend further responses be
26 required as to documents generated during this time period.

1 **4. Objections**

2 In their responses to all of the interrogatories and requests for production addressed
3 herein the responding parties stated objections based upon the following grounds:

- 4 a. attorney-client privilege;
5 b. attorney work product;
6 c. confidentiality and privacy privileges;
7 d. ambiguous, vague, overly broad, unduly burdensome and oppressive;
8 e. number of interrogatories exceeds the number permissible;
9 f. documents requested have already been produced;
10 g. documents requested contain proprietary information protected by privilege; and,
11 h. request seek disclosure of opinions/conclusions of counsel and/or experts.

12 Objecting parties have provided no evidentiary support for any of these objections and
13 none are of such a nature that they can be sustained without such evidence. The Referee will
14 recommend that each all of the objections be overruled and any additional responses ordered by
15 the Court be without objection.

16
17 **5. Time For Compliance**

18 Clearly the time required to provide the additional responses anticipated by the
19 Recommendation of the Referee will be significant. Some significant hardship and burden will
20 undoubtedly be experienced by Plaintiffs in providing the required responses. However, it
21 should not be ignored that the discovery addressed herein has been pending since December,
22 2008, and the initial responses were served in February, 2009. The moving parties have been
23 diligent in their attempts to seek an order compelling further responses, and there has been no
24 dilatory conduct on the part of responding parties to avoid or delay the consideration of this
25 motion. All parties have participated in a meet and confer effort to resolve the dispute without
26 hearing.

27 However, the discovery cut-off date is less than two months away, and if the Court
28 desires to preserve the existing trial date and provide the parties with a reasonable opportunity to

1 prepare for that trial it is imperative that the responses required by this recommendation, should
 2 it be accepted and approved by the Court, will need to be provided within a relatively short
 3 period of time. The Referee will suggest in the recommendations that additional responses be
 4 required on or before July 7, 2009. This recommendation reflects an effort on the part of the
 5 Referee to balance the importance of this discovery against the effort necessary to provide the
 6 additional responses required.

8 RECOMMENDATION

9 The Report and Recommendation of the Discovery Referee/Special Master is accepted
 10 and approved. The parties, in complying with this Order, shall consider the discussion
 11 contained in the Referee's Report herein. All objections asserted by the responding parties are
 12 found to be unsupported and are overruled.

14 **As to the Motion of Defendant Bear to compel further responses by Plaintiff ECC** 15 **to Bear Special Interrogatories, Set 2:**

16 Motion granted.

17 Plaintiff ECC Capital Corporation shall provide further responses without objections to Special
 18 Interrogatory Nos. 16, 17, 18, 19, 20, 21 and 22 on or before ~~July 7, 2009~~ ^{July 23, 2009}.

19 **As to the Motion of Defendant Bear to compel further responses by Plaintiff** 20 **Performance to Bear Special Interrogatories, Set 2:**

21 Motion granted.

22 Plaintiff Performance Credit Corporation shall provide further responses without objections to
 23 Special Interrogatory Nos. 16, 17, 18, 19, 20, 21 and 22 on or before ~~July 7, 2009~~ ^{July 23, 2009}.

24 **As to the Motion of Defendant EMC Mortgage Corporation to compel further** 25 **responses by Plaintiff ECC to EMC Mortgage Corporation Special Interrogatories, Set 2:**

26 Motion granted.

27 Plaintiff ECC Capital Corporation shall provide further responses without objections to Special
 28 Interrogatory Nos. 10, 20, 21, 22, 23, 24 and 25 on or before ~~July 7, 2009~~ ^{July 23, 2009}.

1
2 **As to the Motion of Defendant EMC Mortgage Corporation to compel further**
3 **responses by Plaintiff Performance to EMC Mortgage Corporation Special**
4 **Interrogatories, Set 2:**

5 Motion granted.

6 Plaintiff ECC Capital Corporation shall provide further responses without objections to Special
7 Interrogatory Nos. 10, 20, 21, 22, 23, 24 and 25 on or before ~~July 7, 2009~~ ^{July 23, 2009}.

8 **As to the Motion of Defendants Bear Stearns Residential Mortgage and EMC**
9 **Mortgage Corporation to compel further responses by Plaintiff ECC Mortgage**
10 **Corporation to Bear Stearns Residential Mortgage and EMC Mortgage Corporation Joint**
11 **Requests for Production of Documents, Set 2:**

12 Motion granted.

13 Plaintiff ECC Mortgage Corporation shall provide further responses without objections to
14 Request for Production Nos. 54, 57, 60, 63, 70, 73, 76, 77, 78 and 79 on or before ~~July 7, 2009~~ ^{July 23, 2009}.

15 **As to the Motion of Defendants Bear Stearns Residential Mortgage and EMC**
16 **Mortgage Corporation to compel further responses by Plaintiff Performance Credit**
17 **Corporation to Bear Stearns Residential Mortgage and EMC Mortgage Corporation Joint**
18 **Requests for Production of Documents, Set 2:**

19 Motion granted.

20 Plaintiff Performance Credit Corporation shall provide further responses without objections to
21 Request for Production Nos. 54, 57, 60, 63, 70, 73, 76, 77, 78 and 79 on or before ~~July 7, 2009~~ ^{July 23, 2009}.

22
23 Date: June 6, 2009

James L. Smith
Discovery Referee

24
25
26 IT IS SO ORDERED.

27 Date: ~~June~~ ^{July} 2, 2009

David O. Carter
Hon. David O. Carter
District Judge